STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SHAMROCK CARTAGE, INC.

and **Case 09–CA–219396**

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO. 413

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for the Charging Party

DECISION

I. INTRODUCTION[1]

ANDREW S. GOLLIN, Administrative Law Judge. This case was tried on November 5-6, 2018, in Cincinnati, Ohio. The amended complaint alleges that between April 9-13, 2018 Shamrock Cartage, Inc. (Respondent) threatened, suspended, and later discharged Shane Smith, in violation of Sections 8(a)(1), (3), (4), and (5) of the National Labor Relations Act. This was the second time in eight months that Respondent discharged Smith. The first time occurred in August 2017, immediately after Respondent learned Smith was the lead employee-organizer of a campaign by the International Brotherhood of Teamsters, Local Union No. 413 (Union) to represent Respondent's drivers/yard spotters working at two distribution centers near Columbus, Ohio. The Union filed unfair labor practice charges and post-election objections, and, in November 2017, the parties settled those allegations. As part of the settlement, Respondent was required to reinstate Smith with backpay and recognize and bargain with the Union.

Following his reinstatement, the Union appointed Smith to be the steward and the only employee-member of the Union's bargaining committee. During an April 5, 2018 bargaining session, Respondent proposed a memorandum of understanding regarding the handling of discipline until the parties reached an overall collective-bargaining agreement. The Union rejected the proposal and it was withdrawn. The General Counsel alleges that four days later, on April 9, 2018, Smith's supervisor, Brian Williamson, allegedly threatened Smith at the jobsite

[1] Abbreviations in this decision are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibit; "GC Exh." for General Counsel's Exhibit; "R. Exh." for Respondent's Exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

with the more onerous working condition of working with "bad workers" because the Union rejected Respondent's disciplinary proposal, in violation of Section 8(a)(1) of the Act

Later that same day, Smith had issues with the equipment in his truck used to direct his work. He requested and received permission to call the vendor's technical support for assistance. Smith initially asked the vendor about the issues with his truck, but later also asked about another truck that had been out-of-service for several months because of system issues. The vendor informed Smith it was aware of the issue with the other truck and was waiting to hear back about who was going take responsibility for purchasing a replacement unit for that truck. Smith suggested the vendor send an email to Respondent and the warehouse contractor to verify that the vendor had the correct contact information for the entity responsible for making that purchasing decision. Following the call, the vendor sent an email to that entity, the warehouse contractor, and Respondent mentioning that Smith had inquired about the unit, along with another copy of purchase order to replace the unit. After receiving the email, Respondent suspended Smith pending termination for contacting the vendor and inquiring about the unit in the other truck. There is no dispute Respondent did not notify the Union prior to suspending Smith.

Respondent left a message informing the Union about the suspension. A few days later, Respondent and the Union met to discuss the matter. Following their discussion, on April 13, 2018, Respondent discharged Smith.

The General Counsel alleges Respondent suspended and discharged Smith because he engaged in union activities and filed charges or gave testimony under the Act, in violation of Sections 8(a)(1), (3), and (4) of the Act. The General Counsel also alleges Respondent violated Section 8(a)(5) of the Act when it failed to bargain before making its discretionary decision to suspend Smith. Respondent denies each of the alleged violations. For the reasons stated below, I find Respondent violated Sections 8(a)(4), (3), and (1) when it suspended and discharged Smith, and violated Section 8(a)(5) when it failed to bargain *before* suspending Smith. However, I find the evidence does not establish that Williamson threatened Smith with more onerous working conditions because the Union rejected its proposed disciplinary policy, and I recommend that allegation be dismissed.

II. STATEMENT OF THE CASE

On May 8, 2018, the Union filed an unfair labor practice charge against Respondent in this case. The Union amended the charge on June 12, and again on June 20, 2018. On July 19, 2018, the Regional Director for Region 9 of the National Labor Relations Board (Board), on behalf of the General Counsel, issued a complaint against Respondent over the allegations in the charge. On September 3, Respondent filed its answer to the complaint. On September 12, 2018, the Regional Director issued an amended complaint. On September 25, Respondent filed its answer to the amended complaint.

At the hearing, all parties were afforded the right to call, examine, and cross-examine witnesses, present any relevant documentary evidence, and argue their respective legal positions orally. Respondent and the General Counsel filed posthearing briefs, which I have carefully considered. Accordingly, based upon the entire record, including the posthearing briefs and my observations of the credibility of the witnesses, I make the following findings of fact, conclusions of law, and recommendations:

III. FINDINGS OF FACT[2]

A. Jurisdiction and Labor Organization

Respondent admits it is a corporation with an office and place of business in Rockdale, Illinois that is engaged in truck spotting and hostler services. During the 12-month period ending June 30, 2018, Respondent admits it performed these services valued in excess of $50,000 in states other than the State of Illinois. Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. Respondent further admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3] Based on the foregoing, I find this dispute affects commerce and the Board has jurisdiction, pursuant to Section 10(a) of the Act.

B. Background

1. *Operations and Organizational Hierarchy*

Respondent is owned by Dan O'Brien and Matt Harper. Matt's brother, Michael Harper, is Respondent's general manager. Jason Caccamo was Respondent's site supervisor from April 2017 through March 30, 2018. After Caccamo quit, Respondent promoted Brian Williamson to replace him. Michael Holmes is Respondent's labor relations specialist.

Respondent provides truck spotting and hostler services for Kraft Heinz Foods Company ("Kraft") at its distribution center in Groveport, Ohio, and for Pepsi Company ("Pepsi") at its distribution center in Obetz, Ohio. Both are near Columbus, Ohio. These centers are large warehouses with multiple doors where products are received and shipped using refrigeration trucks and tractor trailers. The products come in from other warehouses or production facilities and then sent out to local grocery stores. Kraft contracts with DHL to manage the day-to-day operations inside its Groveport distribution center. Pepsi contracts with Ryder to manage the day-to-day operations inside its Obetz distribution center.

Respondent employs drivers/yard spotters at both locations. It operates two 12-hour shifts: the first shift is from 7 a.m. to 7 p.m., and the second shift is from 7 p.m. to 7 a.m. There are seven drivers at the Kraft/DHL distribution center (four first shift and three second shift) and, depending on the season, there are two drivers at the Pepsi/Ryder distribution center (one first shift and one second shift). The site supervisor covers both locations.

Respondent's drivers/yard spotters manage and move the trailers to and from the warehouse doors and around the surrounding yard using semi-tractor "yard" trucks. PINC provides logistics equipment and software for the trucks at the Kraft/DHL distribution center. The drivers/yard spotters rely on the tracking system for where to pick up, move, and drop off trailers within the warehouse yard. The tracking system is run through the PINC terminal set up in the cab of each yard truck. The PINC equipment is the property of Kraft, not Respondent.

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[2] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific citations, but rather on my review and consideration of the entire record. The findings of fact are a compilation of credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as having been in conflict with credited testimony or other evidence, or because it was incredible and unworthy of belief.

[3] Respondent amended its answer to admit the Union's Section 2(5) labor organization status. (Tr. 18).

Drivers/yard spotters also can download the PINC app onto their personal smartphone to access the system. Respondent does not require drivers/yard spotters to have or use their personal smartphones for this purpose.

2. *Organizing Campaign, Prior Charges, and Settlement Agreement*

Shane Smith began working for Respondent in April 2017, as a first-shift driver/yard spotter at the Kraft/DHL distribution center. In around May 2017, Smith contacted the Union about organizing Respondent's employees. Thereafter, Smith began speaking with employees and circulating authorization cards. On August 7, 2017, the Union filed a petition in Case 09-RC-203855 seeking to represent Respondent's yard spotter/hostler employees. (Jt. Exh. 1). The following day Respondent discharged Smith for allegedly failing to properly set the thermostat on one of the refrigeration trucks in the yard. On August 10, 2017, the Union filed an unfair labor practice charge in Case 09-CA-204232, alleging, among others, that Respondent discharged Smith because of his union activities. (Jt. Exh. 3). On August 15, 2017, the Regional Director approved a stipulated election agreement providing for a mail-ballot election. According to the Agreement, eligible voters could cast their ballots from August 25 through September 8, 2017. (Jt. Exh. 2). On August 25, 2017, the Union filed another unfair labor practice charge in Case 09-CA-205156, alleging that Respondent had granted certain benefits and made payments in an attempt to discourage employees from voting for the Union. (Jt. Exh. 5). On September 11, the votes were counted, and the Union lost.

The Union filed post-election objections and new and amended unfair labor practice charges (in Cases 09-CA-204232 and 09-CA-207419), alleging Respondent engaged in a pattern of unlawful conduct to undermine support for the Union. (Jt. Exhs. 4 and 6). On October 13, 2017, the Regional Director issued a complaint against Respondent in Case 09-CA-204232. (Jt. Exh. 7). On October 25, 2017, Respondent filed its answer denying the alleged violations. (Jt. Exh. 8). On November 8, 2017, Respondent, through Dan O'Brien, entered into an informal settlement agreement to resolve the objections and all the unfair labor practice charges. The Union, through its counsel, executed the informal settlement agreement on November 9, 2017. The Regional Director approved the bilateral settlement on November 16, 2017. The agreement, which contained a non-admissions clause, required Respondent to reinstate Smith with backpay, recognize and bargain with the Union as the representative of the petitioned-for unit,[4] and have a member of management read the notice to the employees addressing the alleged violations.[5] (Jt. Exh. 9).

[4] As a result of this settlement, Respondent has recognized the Union as the Section 9(a) representative of the following unit of its employees:

> All full-time and regular part-time yard spotter/hostler employees employed by [Respondent] at the DHL facility located at 2842 Spiegel Drive, Groveport, Ohio and at the Ryder Logistics facility located at 3880 Groveport Road, Obetz, Ohio, excluding all office clerical employees, all professional employees, guards and supervisors as defined in the Act.

There is no dispute this unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

[5] Based on representations made by Counsel for General Counsel, there is no contention before me that this settlement agreement should be set aside, or that I make any findings or conclusions regarding the allegations addressed therein. (Tr. 43). As such, my findings and conclusions are limited to the allegations in the amended complaint in the present case, but I have considered the evidence from these prior cases in deciding the present case.

3. *Pre and Post Settlement Conduct Relating to Smith*

Respondent's former site supervisor Jason Caccamo testified at length about Respondent's response to the union organizing campaign. According to Caccamo, after Respondent's owners, Dan O'Brien and Matt Harper, found out employees had signed union authorization cards, they were "extremely angry" and felt that the employees had stabbed them in the back by going through this union organizing process and they wanted to make sure that the Union would not take hold. (Tr. 130-131). They also were concerned the Union could spread to all of their locations across the country, as well as organize the employees working inside the Kraft/DHL and Pepsi/Ryder distribution centers. (Tr. 135-136). O'Brien and Harper instructed Caccamo to find out who was in charge of the organizing effort, why they were organizing, and how much support there was for the Union among the employees. Caccamo subsequently learned from then-driver/yard spotter Brian Williamson that Smith and another employee (Trevor Hamilton) were the two lead employee organizers, and that Smith was the main organizer. According to Williamson, Smith had pulled employees into small groups, along with Hamilton, and talked them into signing authorization cards. Caccamo later relayed this information to O'Brien and Harper, and they told Caccamo to terminate Smith. (Tr. 128-130).

About a week before Respondent learned of the organizing effort, Caccamo issued Smith a written warning for failing to properly maintain the temperatures inside one of the refrigeration trailers properly. (Tr. 130-132) (G.C. Exhs. 3 and 4). Drivers/yard spotters are instructed to override the door sensors on these refrigeration trailers to ensure that the cooling unit does not shut off when the trailer doors are opened. On July 25, 2017, Caccamo noticed that Smith had failed to override the door sensors on one of the refrigeration trailers at issue. Smith was again instructed on how to override the sensors, and, on July 31, 2017, Smith was verbally informed by the warehouse manager to make sure to override the sensors for those trailers. The warning states that Smith thereafter parked a refrigeration trailer at the wrong door and again failed to override the door sensors, and any further errors or refusals to follow procedure will result in corrective action, including termination. Caccamo issued this to Smith on August 1, 2017.

Immediately after learning of Smith's involvement in the union organizing effort, O'Brien and Harper told Caccamo to convert the warning Caccamo had issued to Smith into a termination. On August 8, 2017, Caccamo met and informed Smith that he was being discharged for the failing override the sensors on a refrigeration trailer. (G.C Exh. 5).

That same day, the owners told Caccamo to hold an employee meeting and explain that Respondent had a zero-tolerance policy for incorrectly setting the temperatures on refrigeration trailers. The owners told Caccamo this was to provide Respondent with cover if Smith attempted to challenge his termination. (Tr. 140). Caccamo held the employee meeting as instructed, and he informed all the employees about this zero-tolerance policy. He also said that the owners were aware of the organizing effort, and that if the employees continued to move forward with organizing, the owners would terminate their business at those sites. (Tr. 139-140).[6]

[6] Following Smith's termination, the owners informed Caccamo to continue monitoring the employees and gauge their support for the Union. They also discussed Travis Hamilton, the other employee organizer, and decided to move Hamilton from second shift to first shift so Caccamo could keep an eye on him. (Tr. 141-143) (G.C. Exh. 6). Caccamo spoke with Hamilton. In this conversation, Caccamo stated Respondent was "cutting the head off the snake of the union organizing" effort and warned Hamilton "to keep [himself] in check and not give any reasons to put a bigger target on his back." (Tr. 106; 143).

O'Brien and Harper also told Caccamo to continue talking with the staff to find out their opinions about the Union, and they asked on a daily basis for a head count of who was a "yes" vote and who was a "no" vote. They instructed Caccamo to threaten that if they vote "yes" and the Union came in, tow trucks would come to the sites to pick the yard trucks up and the company would pull out of Ohio. (Tr. 146).[7] It is unclear from the record if Caccamo relayed this threat to employees, as instructed.

Caccamo separately told employees they should take photographs of their marked mail ballots, keep it, and then send the photos to him. (Tr. 173; 268).

As stated, the Union eventually lost the election and filed objections and new and amended unfair labor practice charges.

4. *Respondent's Unsuccessful Efforts to Block Smith's Reinstatement*

Following Smith's discharge, Respondent's owners were concerned about the prospects of him being reinstated. O'Brien and Harper told Caccamo that if the Union was successful in getting Smith reinstated he would make sure that the Union did, indeed, go forward, and he would spread the Union activity throughout the Kraft/DHL and Pepsi/Ryder warehouse facilities. To avoid this, the three had conversations about how they could keep Smith from being able to come back to work. (Tr. 147-148).

One idea to they came up with was to get DHL to state that it refused to allow Smith back on its property because he had previously failed to override the door sensors. (Tr. 152). Caccamo contacted DHL's managers and asked for an email explaining what Smith did wrong and that they did not want him back on the site. On October 1, 2017, DHL Manager Ron Rhodes prepared and sent the requested email, stating:

> To whom it concerns,
>
> All drivers at this facility have been shown how to override the door sensor for Prime trailers. When the doors are left open the refrigerated unit will not run which has caused some loaded [sic.] to be rejected. We now ask that Shamrock override [sic.] these trailers so they are pre cooled for our shipment's [sic.]. If it is an older Prime that will not override the driver is to contact the Tasker and find out if the trailer doors should be left open or closed. Any driver refusing to follow this request will not be permitted to work at our site. For any questions please contact any form of leadership or myself.

(G.C. Exh. 7).

Caccamo forwarded the email to Respondent's owners. O'Brien later advised Caccamo that Rhodes' email was not strongly worded enough, and they needed a more specific letter. O'Brien told Caccamo he would talk with legal counsel and find out what specific language was needed to keep Smith from being reinstated. On October 9, 2017, O'Brien texted Caccamo with

[7] Prior to the election, O'Brien visited the two Columbus sites and met individually with employees in his truck. He talked to them, and gave them each a $100 bill for "being a good worker" or "doing a good job." (Tr. 111-112, 268). One employee was absent and Caccamo was tasked with going to the Pepsi/Ryder site where that employee work to give him the $100, and to tell him "this is a bonus for doing a good job. It has nothing to do with the [U]nion, but by the way, we would really appreciate a 'no' vote." (Tr. 147).

prepared language Respondent wanted Rhodes to use. (Tr. 153-156)(G.C. Exh. 8). Caccamo showed Rhodes the language, and Rhodes copied it onto DHL letterhead and sent it to Respondent. The letter states:

> To Whom It May Concern:
>
> It is come to our attention that a Mr. Shane Smith represents a dangerous liability to not only the products we ship but more importantly to public safety. When certain products are not stored in the correct manner it is incredibly dangerous to ship the products. Mr. Smith improperly utilized equipment at the DHL site in [a] way that could have caused financial lose [sic.] to his employer and this facility, or caused negative health affects [sic.] to the public. It has become clear that he represents an unacceptable danger to both the product shipped, and potentially, to public health.
>
> Mr. Smith was taught and warned by both his own direct employer, and employees of the DHL facility on the proper use and handling of the equipment utilized for his employment. However, Mr. Smith remained an unacceptable danger with his continued misuse of the equipment. For the foregoing reason, we will not tolerate Mr. Smith to work on our site. He poses a danger to equipment, and potentially to public health.

(G.C. Exh. 9).[8]

Another idea Respondent's owners and Caccamo came up with to keep Smith from coming back was for driver/yard spotter Lisa Clarkson to go to the police and file a complaint against Smith regarding a confrontation between them on the day of Smith's discharge. (Tr. 148-149). According to Clarkson, on August 8, Smith jumped up on the side of her truck and told her he had gotten fired. She told Smith she didn't know what to tell him; she was not the boss. Smith blamed Clarkson and called her a "fucking bitch" and a "fucking cunt" and said whenever the Union got him his job back, he would be back and he would make sure that she got "ripped out of her truck." (Tr. 255-257). Clarkson raised issues with Caccamo and Respondent's owners about what Smith said to her and about him coming back. (Tr. 148-149). Respondent took no action at the time. In early October, about two months after the alleged altercation, Caccamo informed Respondent's owners that he would take Clarkson to the Groveport Police Department to file a complaint that could possibly result in the issuance of a restraining order against Smith. On October 19, 2017, Caccamo took Clarkson to file the police complaint against Smith. (Tr. 150-151)(R. Exh. 2). The complaint reads, in pertinent part:

> Reporting party (Clarkson) states that on 8/8/17 at about 12:00 another employee of Kraft, Shane Smith, did climb onto her semi power unit and begin to yell and scream at her because he had recently been fired. He stated to her that when he got his job back he was going to pull her out of her truck. Clarkson states that Smith did not like her throughout his employment with the company.

[8] During the investigation into the unfair labor practices, Respondent submitted this letter to the Region. The Region contacted Rhodes to verify the letter was accurately written by him, and Rhodes did not do so. DHL management later found out Rhodes wrote the letter without their permission, and Caccamo was called into DHL's human resources office and asked why he was asking DHL's staff to write emails and letters regarding Smith. (Tr. 159-160).

(R. Exh. 2).

According to Caccamo, the police took no action against Smith because "this happened several months before and it was only a verbal confrontation." (Tr. 151).

Pursuant to the terms of the bilateral settlement agreement, Smith returned to work in November 2017. The day before his return, Respondent's owners instructed Caccamo to follow Smith around "like a puppy" to monitor him. Dan O'Brien also told Caccamo to have a recorder with him in case Smith said anything to him. Clarkson also had a recorder with her. (G.C. Exh. 10). Management told Caccamo to find anything that Smith possibly did wrong, to make sure that every refrigerated trailer he set was correct because of the previous issue, as well as look for any insubordination or any level of rudeness either with the rest of the staff, internal management, or with the DHL warehouse staff. (Tr. 164). For the first week, the owners called Caccamo on a daily basis to get an update on Smith. After that, they continued to call Caccamo, albeit less frequently, to check in about Smith. (Tr. 165).

According to Caccamo, Smith "actually came back as a great employee." He made a couple of minor mistakes in terms of setting refrigerated trailers or putting trailers in the wrong door, but, as Caccamo testified, such errors are commonplace and tolerated. Smith came to work, didn't call off, respected Caccamo and did a good job. (Tr. 165). The Union advised Smith to stay away from Clarkson, and he left her alone. Clarkson confirmed she had no further issues with Smith. (Tr. 266).[9]

C. Alleged Unfair Labor Practices

1. *April 5, 2018 Bargaining Session and Proposal*

Following his reinstatement, the Union appointed Smith to be steward and the only employee member of its bargaining committee. Smith participated in all bargaining sessions.[10] He attended the session on April 5, 2018. Smith and Union business agent Theodore Beardsley participated for the Union; Attorney Jim Allen and labor relations specialist Michael Holmes participated for Respondent. During this session, Respondent proposed a memorandum of understanding regarding discipline that occurred prior to the parties reaching an overall agreement. The proposed memorandum stated:

> 1. SHAMROCK CARTAGE (SHAMROCK) and the TEAMSTERS LOCAL 413 (Union) agree that prior to suspending or terminating any bargaining unit employee represented by the Union, SHAMROCK will notify the on-site

[9] Williamson also confirmed that Smith's work performance was good. (Tr. 280). He did claim, however, to have learned from others about two issues involving Smith. First, Smith apparently told a new employee on his first day of employment that he needed to get a smartphone to be able to access PINC in case the unit in his truck goes down, otherwise he would get less desirable assignments because he would have to rely on other drivers/spotters to relay assignments to him; that new employee quit later that same day. Second, Smith told a slower driver/yard spotter that he could not take lunch one day because he was working too slow. Williamson talked to Smith about both instances, informing him that Respondent does not require its drivers/yard spotters to get smartphones, and employees cannot, by law, be denied lunch. (Tr. 273-280). Respondent did not issue Smith any written discipline for these incidents, and there is no contention that Respondent relied upon these incidents in making the later decision to suspend and discharge him.

[10] According to Beardsley, one of the issues the parties discussed during negotiations was the issues the drivers/yard spotters were having with PINC, and resulting delays that those issues caused. (Tr. 70).

steward, if he or she is available, and the Business Agent of the pending disciplinary suspension or termination as soon as possible but no later than seventy-two (72) hours after the company's decision. SHAMROCK further agrees that it may suspend disciplinary suspension or termination for seventy-two (72) hours (excluding weekends), from the time and date of the notice, so the [Union] may conduct its own review and communicate its position to SHAMROCK. At the request of the [Union], SHAMRCOK representatives will meet with the [Union] representatives to finalize or further discuss termination/disciplinary action.

2. SHAMROCK and the Union agree that SHAMROCK shall have the right to place an employee on investigatory leave, with or without pay. SHAMROCK will notify the on-site steward, if he is available, and the Business Agent of the investigatory leave. At the request of the Union, SHAMROCK representatives will meet with the Union representatives to finalize or further discuss the investigatory leave. If the investigatory leave was without pay and after the investigation is concluded SHAMROCK determines that the employee's actions did not warrant discipline, the employee shall be reinstated with back pay for the dates they were on investigatory leave. If the investigatory leave was without pay and after the investigation is concluded, SHAMROCK determines that the employee's action did warrant discipline, the discipline shall be immediately implemented and the employee shall not be eligible for any pay or benefits for the dates they were on investigatory leave.
3. SHAMROCK in the Union agree that SHAMROCK shall have the right to issue other forms of discipline when it deems warranted, such as an oral and written warning, to any bargaining unit employee.
4. The parties agree that this interim discipline policy shall serve as the agreement of the parties regarding discipline pursuant to *Total Security* and shall not serve to prejudice either party from introducing a different proposal for discipline/grievance resolution during contract negotiations.
5. This Memorandum of Understanding is effective upon execution and shall remain in effect until modified in writing by the parties or a collective bargaining agreement is executed.

(G.C. Exh. 2).[11]

Beardsley and Smith briefly caucused, and Beardsley stated the Union would not agree without a just cause requirement. Respondent thereafter withdrew the proposal. (Tr. 63-64).

2. *April 9 Morning Exchange Between Smith and Williamson*

On April 9, 2018, Smith was working at the Kraft/DHL distribution center. At around 9 a.m., Smith drove his truck over alongside Brian Williamson's truck to speak with him. Williamson had recently assumed the duties of site supervisor, replacing Jason Caccamo. As stated, the Union had appointed Smith to be steward, and Smith asked Williamson about Shane Soward, a new employee working night shift at the Pepsi/Ryder distribution center who was involved in an incident on about March 26, 2018. Williamson and Smith both testified about their exchange. There was no one else present.

[11] *Total Security* is in reference to the Board's decision in *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), which is discussed below.

Smith testified he told Williamson he heard Soward "got mouthy" with the manager at the Pepsi/Ryder center and asked about his status. Williamson responded they were going to fire Soward. (Tr. 202-203). Smith testified as follows about what happened next:

> Q: So what happened next in this conversation?
> A: Okay. Then -- then -- then -- basically -- okay. He -- basically, Brian said -- he said after talking to the – talking to the manager, he -- okay. Brian said after he talked to the manager, that all the good workers, he was going to bring -- bring back and all the bad workers, I was going to place on you. Then I asked -- then I said, "Why is that?" And then --
> Q: Go ahead.
> A: Okay. I said, "Why is that?" He said, "Because you guys just met up the week before in contract negotiations. You wouldn't give us a -- a temporary discipline policy, and we're stuck with him. So I -- I just -- so I decided -- so I decided that I'm going to go ahead and the good employees, put them back, and then the bad employees, I'm going to go ahead and place with you, you big, bad – your big bad union and your fellow first-shift workers, and you can deal with them."
> Q. And how did you respond when he said that to you?
> A. Went back to work.

(Tr. 203-204).

Williamson testified as follows about this exchange with Smith:

> Q. You've never threatened anyone with putting all the bad workers on the shame shift?
> A. I didn't look at that as a threat. Can I answer? I didn't look at that as a threat. I had an employee, Shawn Soward, and he worked at [ ] the Pepsi location and he got into an altercation with the Pepsi manager, and he told the Pepsi manager, "Fuck you, you little bitch." And then the Pepsi manager went into the warehouse and calls me at 1:30 in the morning, "I want this driver removed from the property and I need another spotter in here ASAP." And that's exactly what I did. Within 30 minutes, got Mr. Soward removed, sent him over to Kraft, brought another spotter, John Ross, over to the Pepsi facility to cover the shift.
>
> It was one of those situations where if you get into a fender bender, do damage to the truck, mess up a mirror, I can cover for you, but as soon as you start using profanity to our client or to our customer, my hands are tied.
>
> ….
>
> [W]hen I presented this to Mr. Smith, his attitude was like, oh, so he can't go to Pepsi no more. Bring him over on the Kraft schedule. And, what, put him on your schedule? Then he's going to mouth off to another warehouse? So I said it like that, put him on with your schedule? 'Cause Mr. Smith is telling me, oh, you have Pepsi. No problem. Put him on the Kraft schedule. So, yeah, I guess I did say that. I didn't look at it like a threat, though. I looked at it like you're telling me that it's no big deal that he mouthed off to Pepsi, bring him over to Kraft. Well, I'll put him with you. You deal with him. I can't have employees mouthing off to our customers.

(Tr. 281-282).

3. *Issues with PINC System and Calls to Customer Support*

Later that same day, Smith was having issues with the PINC terminal in his yard truck. As stated, PINC is the equipment and software system installed in the trucks to inform the drivers/yard spotters of their assignments and what trailers they are to pick up/drop off and where they need to go. Smith had been having issues with the PINC unit for more than a week, and he was forced to use the PINC app on his smartphone to get his assignments. At around 12 or 12:30 p.m., Smith drove his truck up alongside Williamson's truck and told him that the PINC unit in his truck was "messing up." Smith told Williamson that, in the past, former site supervisor Jason Caccamo would call PINC to get the issue resolved, and Smith asked Williamson whether as the new manager he was going to call PINC to take care of the problem. Williamson responded back "no" and that Smith could go ahead and take care of it himself. Smith asked Williamson to confirm that he was giving Smith permission to call PINC and take care of the problem himself, and Williamson said "yes." Smith then told Williamson that he did not know how to handle the matter. Williamson answered that there was a 1-800 number on the sticker on the PINC computer screen in the truck, and if it is not there, to go to look at the screen in another truck to write down the number. Williamson told Smith to call the 1-800 number and there would be three prompts, and to select the IT department. Once he got the IT department, the customer support person on the phone will ask Smith three or four questions (i.e., name, truck number, location, etc.). Smith told Williamson he would call during his lunch break, so that the truck was not down. That was the end of their conversation. (Tr. 205-208)

About an hour later, during his lunch break, Smith called the toll-free customer support number for PINC in California. He went through the prompts and was connected to a customer support technician named "Dave." Smith gave his name, that he was a driver/yard spotter for Respondent at the Kraft/DHL center, that he was having diagnostic problems with the unit in his truck (truck 263), and that he had been instructed to call PINC to see if someone could help. (Tr. 209-210). Dave attempted to remotely access the PINC terminal in truck 263 to run a diagnostic check, which took several minutes to attempt.

While on the phone, Smith asked Dave about another truck in the yard, truck 261, which had been out-of-service for over three months because of issues with its PINC unit. Dave called over to the supply chain manager ("Jerry") to relay Smith's question about truck 261. Jerry got on the phone and told Smith he was aware of the issue with truck 261, and PINC sent an email or billing invoice to the DHL warehouse manager and to a Shamrock manager about replacing the unit. Jerry informed Smith that DHL and Shamrock communicated back that neither was responsible for paying for a replacement, and that Kraft would be responsible for paying for it. Jerry said PINC was still waiting on billing approval from Kraft before replacing the unit. Smith then asked whether PINC had sent out an email to DHL or Shamrock asking for updated contact information for the people at Kraft, so PINC could contact Kraft directly. Jerry said he could do that, and he asked Smith whether he could mention that the email was sent per a discussion with a driver. Smith replied that he did not have a problem with that. (Tr. 213-215). That was the end of the conversation. Smith then got off the phone and returned to work. PINC was unable to fix the issue with Smith's truck, so he had to use the PINC app on his smartphone for the rest of his shift. (Tr. 216).

4. *Suspension of Smith*

Later that afternoon, PINC sent an email to DHL and Kraft representatives, copying Brian Williamson. The email was not introduced into evidence. According to Williamson, the email from PINC stated that "driver Shane" was inquiring about a purchase order for the

computer in truck 261. Attached to the email was an invoice for around $3,200. (Tr. 325-326). Before Williamson could respond back, DHL's manager (Joe Hunt) communicated with PINC that they had discussed this matter in the past, and Shamrock and DHL are not responsible for paying for the replacement unit, and that Kraft would be handling it. (Tr. 326-327). After receiving the email, Williamson called labor relations specialist Michael Holmes. Holmes spoke with owner Dan O'Brien. According to Holmes, O'Brien told him, "Look, we don't know what he's doing right now. We don't know who he's contacting. We don't know what is going on. He needs to leave the property." (Tr. 340). Holmes contacted Williamson and told him to have Smith leave the property. Holmes also told Williamson he would listen in by phone when Williamson spoke with Smith about the suspension.

Smith continued to work until around 5 or 5:30 p.m., when he received a call from Williamson. Williamson told Smith to come over and see him. Smith drove his truck over to Williamson's truck. Williamson informed Smith that he was being suspended pending investigation leading to termination, and he instructed Smith to park his truck, gather his belongings, and leave the site. Smith asked Williamson several times why he was being suspended, but Williamson would not provide him with a reason. Smith then asked whether it had anything to do with him calling PINC for the diagnostic and inquiring about truck 261 and the email, and Williamson responded "yes."[12] On his way out, Smith told Williamson that he would be contacting the Union; he would win his job back with backpay; and "when I get back you are done." (Tr. 290).[13] Holmes was listening on the phone to this conversation between Smith and Williamson.

5. *Discussion with Union over Smith's Suspension*

Shortly after Williamson notified Smith of his suspension, Holmes called and left a voicemail message with Union business agent Ted Beardsley, and later with the Union's attorney Clement Tsao, to advise that Respondent had suspended Smith. At the time, Beardsley was involved in bargaining, and he retrieved Holmes's message later. Beardsley called Holmes back, and the two agreed to meet to discuss the matter. (Tr. 343-344)

The meeting took place on around April 12, and it lasted about 45 minutes to an hour. Smith, Beardsley, and Union business agent Dave Payne attended for the Union. Holmes was present in person and Attorney Jim Allen was present by telephone for Respondent. Williamson did not attend this meeting. Holmes stated that Smith had been suspended for contacting PINC without permission. [Williamson denied giving Smith permission to call PINC.] Holmes also stated that Smith represented himself as something more than he was when he inquired about truck 261. Smith was given an opportunity to give his side of the story. At the end of it, Holmes and Allen said the company was going to continue to investigate, and if there is no evidence establishing that Smith had authority to contact PINC, the company intended to terminate Smith at the end of the investigation. (Tr. 344). Holmes and Allen stated they would discuss the matter with Respondent's owners and get back them within a day or two.

[12] Respondent's employee handbook addresses discipline (Jt. Exh. 10, pp. 034-035), but it is not a progressive disciplinary system, and there is no evidence Respondent regularly suspends employees for certain offenses. Holmes confirmed Smith's suspension was a discretionary decision. (Tr. 355-356).

[13] After Smith left the property, he called PINC and talked again with both Dave and Jerry about their earlier conversations. Smith informed them he had been suspended and wanted to go over word-for-word to try to understand what he may have said that warranted being suspending. (Tr. 231-232).

6. *Discharge of Smith*

On April 13, 2018, Holmes called Smith to inform him that after completing their investigation the owners decided to discharge him.[14] Respondent never issued anything to Smith or the Union stating its asserted rationale for firing Smith. (Tr. 222).[15]

IV. ANALYSIS

A. Witness Credibility

This case presents certain matters that require an assessment of witness credibility. In assessing credibility, I have relied primarily on witness demeanor. I also have considered factors such as: the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership*

[14] Smith testified he was paid for April 9, but not the other days he was suspended. (Tr. 223). Respondent presented no evidence, testimony or documentation, that Smith was paid for those days.

[15] Counsel for General Counsel introduced subpoenaed documents of discipline Respondent issued from July 2016 to the present. (G.C. Exh. 11). Respondent provided no documentation of any employee being disciplined for contacting PINC with or without authorization. The parties stipulated the only other responsive discipline was that issued to Damien Kerney, Travis Hamilton, and Shane Soward.

Kerney worked at an unrelated location. He arrived half an hour late for work and was sent home after he began "mouthing back" and being "disrespectful" to a customer. The customer asked Respondent that Kerney not be returned to its facility. The documents do not specify what Kerney said or did, or what, if any, other action Respondent took against him. (G.C. Exhs, 12(a) and 12(b)).

Hamilton received over 15 warnings based on his attendance. From mid-April through July 2018, Hamilton called off work at least 13 times, including when he was a lead person. Several of these call-offs occurred less than 2 hours prior to the start of his shift, making it difficult for the site supervisor to find a replacement. In one of the warnings, Williamson noted that he had been covering for Hamilton by "not reporting his absences to corporate." (G.C. Exh. 12(i)). Hamilton's absences often left the facility short-handed, including over busy holiday weekends. On July 4, 2018, after Hamilton was a no-call/no-show, Williamson changed Hamilton's schedule and relocated him to another warehouse. (G.C. Exh. 12(p)). On July 29, 2018, Hamilton called off again, and Williamson requested that ownership terminate him. (G.C. Exh. 12(r)). Hamilton, however, continued working for Respondent until October 2018. (Tr. 94).

As discussed, Soward directed profanity at a manager at the Pepsi/Ryder distribution center on March 26, 2018. (G.C. Exh. 12(c)). According to the incident report, the manager called Soward a "dummy" and Soward responded by saying, "Fuck you, you little bitch." The manager called Williamson at about 1:30 a.m. and demanded that Soward be replaced. Williamson then called Soward and reassigned him to the Kraft/DHL distribution center for the remainder of his shift, and that another driver/yard spotter was coming in to relieve him. Williamson told Soward he could not speak to customers that way. He also gave Soward suggestions on how to handle the situation better, and that Soward should have let Williamson know so he could have spoken with the customer. Soward responded that this was "bullshit." Soward was not scheduled to work the next two days. On the third day, Williamson called Soward. He reminded Soward that he had been working for Respondent for 3 days, was still in his training stages, and that he cannot use profanity toward customers. Before Williamson could finish, Soward cut him off by saying, "You know what. Your [sic] a dick and you can shove that job up your ass!" Soward then hung up on Williamson. Respondent eventually discharged Soward. It is not clear what the final reason was for Soward's discharge. At the hearing, Williamson testified it was because of what Soward said to the manager at Pepsi/Ryder, but the report reflects that two days after Soward directed profanity at the manager, Williamson still was attempting to counsel him, and it was not until after Soward called Williamson a "dick" and told him to shove the job up his ass that Soward was discharged.

Group, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008)(citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2nd Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)).

The General Counsel called Union business agent Ted Beardsley, former employee Trevor Hamilton, former site supervisor Jason Caccamo, and Shane Smith as witnesses. Respondent called employee Lisa Clarkson, site supervisor Brian Williamson, and labor relations specialist Michael Holmes as witnesses.

In general, I found Caccamo to be a highly credible witness. He testified fully and honestly on both direct and cross-examination. His recollection was detailed, consistent, and corroborated by documentary evidence, including contemporaneous emails and text messages. He also did not demonstrate a bias for or against any side. He testified on behalf of the General Counsel, but did not appear to favor Smith, acknowledging that his nicknames for Smith included "asshole" and "crybaby." He did not demonstrate any animosity toward Respondent, stating he resigned his employment on good terms in order to accept other employment. Caccamo fully acknowledged, in detail, his involvement in undermining the union organizing campaign and getting rid of Smith, the efforts to fabricate reasons to keep Smith from being reinstated, and, later, the monitoring of Smith to look for reasons to terminate him following his reinstatement. Respondent made no effort to refute Caccamo's very damaging testimony, other than to attempt to undermine his credibility by introducing his prior criminal convictions for fraud. (R. Exh. 1). I found this attempt unavailing considering his overall credible demeanor and the corroboration of his testimony through contemporaneous documentation. Additionally, Respondent's owners hired and employed Caccamo with full knowledge of these prior convictions. (Tr. 186-187).

I found Beardsley and Hamilton to be credible witnesses. Each testified in an honest and forthright manner, but their testimony largely related to peripheral matters not critical the allegations at issue. I found Smith, Williamson, Clarkson, and Holmes to be partially credible witnesses. At times, each provided inconsistent, implausible, or self-serving testimony that favored his/her respective position(s). As discussed below, their failure to testify fully at times has led me to only credit those portions of their testimony consistent with my findings of fact.

Respondent did not call owners Dan O'Brien or Matt Harper, or general manager Michael Harper, to testify. Caccamo, Williamson, and Holmes each testified that O'Brien and Matt Harper made the adverse employment decisions regarding Smith (in August 2017 and April 2018). The Board recognizes that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which that witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d 720 (6th Cir. 1988). This is particularly true where the witness is an agent of a party. *Roosevelt Mem. Med. Ctr*., 348 NLRB 1016, 1022 (2006). Specifically, the Board will infer that such a witness, if called, "would have testified adversely to the party on that issue." Id.; see also *Flexsteel Industries, Inc*., 316 NLRB 745, 758 (1995). In particular, the Board will not hesitate to draw an adverse inference from a respondent's failure to present the testimony of a decision maker as to his/her motive in taking the alleged discriminatory action. See *Dorn's Transportation*, 168 NLRB 457, 460 (1967), enfd. in pert. part 405 F.2d 706, 713 (2nd Cir. 1969) (failure of the decision maker to testify "is damaging beyond repair"); *The Southern New England Telephone Co*., 356 NLRB No. 118

(2011) (failure to call decision maker warrants adverse inference); *Government Employees (IBPO)*, 327 NLRB 676, 699 (1999). See also *Interstate Circuit v. United States*, 306 U.S. 208 (1939) ("The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse"). Respondent presented no explanation for why these decision makers did not appear and testify at the hearing. *Martin Luther King Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977) (adverse inference appropriate where no explanation as to why supervisors did not testify). I, therefore, draw an adverse inference based on Respondent's failure to call owners Dan O'Brien or Matt Harper to testify.

In addition to these general findings, there are specific conflicts in testimony that directly or indirectly affect my findings and conclusions in this case. The first concerns the conversation between Smith and Williamson on the morning of April 9, when Williamson allegedly threatened Smith that he would assign the bad employees to Smith's shift because the Union had rejected Respondent's proposed memorandum of understanding dealing with discipline. I credit Williamson's recollection and testimony regarding this exchange. It is more logical and plausible. To begin with, the unrefuted testimony is that Williamson was not present for, had no involvement in, or knowledge of the proposals exchanged during negotiations once he became a supervisor in early April. Therefore, there is no basis from which to conclude that Williamson knew the Union had rejected the Respondent's proposed memorandum of understanding at the time of this exchange with Smith. Also, while Smith testified fully, clearly, and in detail on all other matters, he did not do so regarding this exchange. As the previously quoted portions of the transcript demonstrate, Smith struggled mightily to recall and testify about the contents of what was said. His testimony was, at best, disjointed, particularly over how their conversation transitioned from Soward to assigning "bad employees" to work on Smith's shift at Kraft.

In contrast, Williamson's recollection and testimony about this exchange was more logical and plausible. I find that Smith, as the Union steward, likely was looking for ways to help Soward keep his job; hence, he suggested that Respondent reassign Soward to work first shift at the Kraft location. I credit that Williamson's reaction was one of disbelief. He could not believe Smith would suggest Respondent keep and reassign a new employee that had directed profanity at a manager of one of Respondent's customers to another facility and run the risk that employee would engage in similar conduct at that new location. To which Williamson sarcastically responded, "Well, I'll put him with you. You deal with him." I credit there was no mention of the Union or its rejection of Respondent's proposed memorandum of understanding addressing discipline prior to the parties reaching an agreement.

The second conflict concerns whether later that day Smith requested and obtained Williamson's permission to contact PINC about truck 263. Williamson denied giving Smith permission during his testimony. (Tr. 308-309). I do not credit Williamson's denial. Based on the testimony of Smith, Clarkson, and Caccamo, the practice had been that employees would go to Caccamo when they had issues with the PINC terminals, and he typically would call PINC to obtain assistance in addressing the issue. (Tr. 258). That practice changed later when PINC informed Caccamo that it wanted to speak to the drivers in the truck to more directly help troubleshoot their issues. (Tr. 371-372). However, the drivers were still to notify Caccamo when there was an issue and they were going to contact PINC. Williamson was the new site supervisor, and it is logical that Smith would ask to determine if Williamson was going to follow the same procedure, or was he going to require a different procedure. Additionally, I credit that Smith never contacted PINC before this, so it is logical that he would ask Williamson what number to call and the procedure to follow once he was talking with customer support. Finally, after Smith was terminated for the second time, Williamson called Caccamo with unrelated

questions. In that conversation, Williamson informed Caccamo that Smith had been terminated, and he explained what happened. In his explanation to Caccamo, Williamson acknowledged that he had given Smith permission to contact PINC to resolve the issue with his truck. (Tr. 369-370). Based on this evidence, I credit Smith requested and received permission to contact PINC on April 9 regarding the issues with the unit in his truck.[16]

The third conflict concerns why Clarkson went to the police to file a complaint against Smith on October 19, 2017, more than two months after their confrontation. Clarkson testified she filed the complaint after she "found out that Shane was coming back" and she wanted a paper trail in case it happened again. (Tr. 262). Clarkson also testified that no one told her to file the complaint. (Tr. 262). I do not credit her testimony. Caccamo credibly testified that he spoke with Clarkson about filing the complaint, and that he accompanied her to the police department. Furthermore, Clarkson damaged her credibility on whether she went to the police station alone. Clarkson initially testified she went to file the complaint alone. Then when specifically asked if Caccamo accompanied her, Clarkson initially said no. She then changed her answer to confirm he did. (Tr. 265). I find her initial responses were not a genuine failure to recall but rather a deliberate effort to conceal. More importantly, I do not credit that Clarkson filed the complaint because she "found out that Shane was coming back." There is no evidence Smith was coming back to work as of October 19. Six days before Clarkson went to the police, the Regional Director issued the complaint alleging that Respondent unlawfully discharged Smith because of his protected union activities. It was not until November 9--*three weeks after Clarkson went to the police*--that the parties signed off on the informal settlement providing of Smith's reinstatement. The only evidence of discussions occurring at or around this same time were Caccamo's conversations with Respondent's owners about coming up with reasons to block Smith from being reinstated, including having DHL fabricate a letter and taking Clarkson down to file a police complaint to possibly get a restraining order. In light of the foregoing, I find Clarkson did not file the police report in case Smith threatened her following his reinstatement, but rather to provide a seemingly legitimate reason to block Smith from returning at all.

B. *Alleged Violations*

1. Threat of more onerous working conditions

The amended complaint alleges that on April 9, 2018, Williamson threatened Smith with the more onerous working condition of working with "bad workers" because the Union rejected Respondent's proposal on discipline during contract negotiations, in violation of Section 8(a)(1) of the Act. Section 8(a)(1) provides that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." In assessing whether a remark constitutes a threat, the appropriate test is whether the remark can reasonably be interpreted by the employee as a threat. *Smithers Tire*, 308

[16] Williamson offered testimony on other matters that undermine his overall credibility. For example, when Williamson was asked whether O'Brien came to the job site to distribute $100 bills to employees prior to the Union election, he testified O'Brien came to the site four times prior to the instance at issue to give employees $100 for their good work. However, in his pre-hearing Board affidavit, Williamson testified that the last time he had seen O'Brien prior the visit at issue was in April when the employees were hired and first began learning the job. (Tr. 315-316). Also, Caccamo credibly testified he and Williamson had nicknames for Smith, such as "crybaby," "asshole," and "superstar." The last was a favorable reference to Smith's strong work performance, while the others related to his personality. Williamson denied referring to Smith as a "crybaby" but admitted to calling him a "superstar." (Tr. 303). I find he denied using these other nicknames so as not to present as having hostility toward Smith.

NLRB 72 (1992). The intent of the speaker or the effect on the listener is immaterial. Id.; see also *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981) (inquiry under Sec. 8(a)(1) is an objective one which examines whether the employer's actions would tend to coerce a reasonable employee). The Board considers the totality of the circumstances in assessing the reasonable tendency of an ambiguous statement or a veiled threat to interfere with, restrain, or coerce. *KSM Industries*, 336 NLRB 133, 133 (2001).

The General Counsel asserts this threat occurred when Smith inquired about whether Respondent was going to terminate Shawn Soward for mouthing off to a manager at the Pepsi/Ryder distribution center. As stated, there was a conflict in testimony between Smith and Williamson over what was said, and I have credited Williamson. I find Williamson made no mention of the Union or its rejection of Respondent's proposed memorandum of understanding on interim discipline. I, therefore, do not find that Williamson threatened Smith with the more onerous working condition of working with "bad workers" because, as alleged, the Union rejected Respondent's proposal on discipline during contract negotiations, and would therefore recommend dismissal of this independent 8(a)(1) allegation.

2. Unlawful Suspension and Discharge of Smith

The amended complaint alleges Respondent suspended Smith on April 9, 2018, and later discharged him on April 13, 2018, because of his protected union activities, in violation of Section 8(a)(3) and (1) of the Act. Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. The amended complaint also alleges Respondent suspended and later discharged Smith in April 2018, because he gave testimony to the Board in the form of an affidavit, was named in a charge in Cases 09-CA-204232 and 09-CA-207419, and cooperated in a Board investigation in Cases 09-CA-204232, 09-CA-205156 and 09-RC-203855, in violation of Section 8(a)(4) and (1) of the Act. Under Section 8(a)(4), an employer may not discharge or otherwise discriminate against an employee because he/she has filed charges or given testimony under this Act.

In cases where the employer's motivation for the adverse action(s) is at issue, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *American Gardens Mgmt. Co.*, 338 NLRB 644, 644-645 (2002)(applying *Wright Line* to Section 8(a)(4) allegations). To establish a violation under *Wright Line*, the General Counsel first must prove, by a preponderance of the evidence, that the employee's protected activity was a motivating factor (i.e., whole or in part) in the employer's decision to take the adverse action(s) at issue. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel satisfies this burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus.[17] Animus can be established through direct evidence or inferred from circumstantial evidence. See *Kajima Engineering & Construction*, 331 NLRB 1604, 1604 (2000); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). See also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that "[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices,

[17] The General Counsel, however, is not required to "demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301, fn. 10 (2014), enfd. sub nom. *AutoNation v. NLRB*, 801 F.3d 767 (7th Cir. 2015).

tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation").

As part of this initial showing, the General Counsel may offer proof that the employer's stated reasons for the adverse actions are pretextual. *Con-Way Freight, Inc.*, 366 NLRB No. 183, slip op. at 3 (2018) (citing to *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); and *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995)). A finding of pretext defeats any attempt by the employer to show that it would have taken the adverse action absent the employee's statutorily protected activities. Id. This is so because where the reasons given for the employer's action are pretextual (i.e., either false or not in fact relied upon), the employer fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. Id. (internal citations omitted).

Pretext may be demonstrated by various factors, including disparate treatment, shifting explanations, or an inadequate investigation into a discriminatee's alleged misconduct. See, e.g., *Shamrock Foods*, 366 NLRB No. 117, slip op. at 27-28 (2018) (employer's shifting, false, or exaggerated reasons for an adverse action); *Airgas USA, LLC*, 366 NLRB No. 104 (2018) (disparate treatment in discipline); *St. Paul Park Refining Co.*, 366 NLRB No. 83 (2018)(failure to conduct complete and objective investigation); *Lucky Cab Co*., 360 NLRB 271, 277 (2014)(providing additional reasons for discharge at a hearing); *Air Flow Equipment, Inc.*, 340 NLRB 415, 418 (2003)(reliance on stale incidents and conduct previously tolerated and accorded no discipline); *Martech MDI*, 331NLRB 487, 505-506 (2000), enfd. 6 Fed. Appx. 14 (D.C. Cir. 2001) (inconsistent explanation and false and shifting reasons for adverse action); *Baptist Hospital, Orange*, 328 NLRB 628, 635 (1999) (failure to comply with established disciplinary procedure); and *Stoody Co*., 312 NLRB 1175, 1182-1183 (1993) (failure to timely document or follow established disciplinary policies).

If the General Counsel fails to establish pretext, but establishes the *Wright Line* factors, the burden shifts to the employer to show that it would have taken the same action in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089. See also *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014); enfd. 801 F.3d 767 (7th Cir. 2015); *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (if General Counsel makes a strong initial showing of discriminatory motivation, the respondent's rebuttal burden is substantial), enfd. 646 F.3d 929 (D.C. Cir. 2011). The employer cannot meet its burden merely by showing it had a legitimate reason for its action; rather, it must show it would have taken the same action in the absence of the protected conduct. See *Bruce Packing Co*., 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015); *Carpenter Technology Corp*., 346 NLRB 766, 773 (2006) (The issue is not simply whether the employer could have disciplined the employee, but whether it would have done so, regardless of his/her protected activity).

The General Counsel has established that Smith's statutorily protected union and Board activities were a motivating factor in Respondent's decisions to suspend and discharge him in April 2018. Smith was the Union's lead union organizer, responsible for soliciting authorization cards that led to the filing of the RC petition. The day after that petition was filed, Respondent discharged Smith, and the Union filed a charge specifically alleging he was discharged in retaliation for his protected union activities. Smith provided an affidavit in support of that charge, as well as the Union's other charges and the post-election objections. Respondent eventually entered into a settlement to resolve these matters. The settlement required Respondent to reinstate Smith with backpay and, among other steps, have a member of management read the notice to employees at a future date. Upon his reinstatement, the Union selected Smith to be

the steward and the sole employee member of its bargaining committee. Smith participated in all contract negotiations. Aside from the affidavit, I find Respondent had direct knowledge of Smith's alleged protected activities.

Respondent has demonstrated substantial and pervasive anti-union animus. According to Caccamo, from August through the end of his employment on March 30, 2018, Respondent's owners were committed to ending the organizing effort and ensuring that it did not spread to the warehouse(s) or any of Respondent's other facilities. In August, Respondent committed a series of hallmark violations after the petition was filed, including polling employees about their union support, threatening closure if the employees continued to support the Union, discharging the lead union organizer (Smith), warning the other organizer (Hamilton) not to do anything to make himself more of a target, and later reassigning him to allow management to monitor his activities. As Caccamo testified, Respondent's decision to discharge Smith was based on exaggeration and cover-ups. Respondent discharged Smith for failing to properly set the temperature in the refrigeration trailers—the exact conduct for which he had already been disciplined with a written warning a week earlier. The only intervening event between when Caccamo issued Smith the warning and discharging him is Respondent's owners learning Smith was the lead union organizer. As a post hoc justification, Respondent's owners instructed Caccamo to hold an employee meeting and announce a zero-tolerance policy for employees who fail to set the temperature in the trailers properly.[18] Thereafter, Respondent engaged in exaggeration and fabrication to keep Smith from being reinstated, including manufacturing evidence that Smith could not return because he posed an unacceptable risk and taking Clarkson to file a complaint to possibly get a restraining order against Smith. Once Smith was reinstated, Caccamo was instructed to continue monitoring him and find anything that he possibly did wrong. In other words, just as it had after learning that Smith was responsible for the union organizing effort, Respondent adopted the practice of "watchfully waiting" for a reason or pretext that it could seize upon as a means of getting rid of Smith, again. See *San Benito Health Foundation*, 318 NLRB 299 (1995); *Kut Rate Kid and Shop Kwik*, 246 NLRB 106 (1979) (and cases cited therein); and *NLRB v. Lipman Bros., Inc.*, 355 F.2d 15, 21 (1st Cir. 1966). This monitoring continued, albeit less frequently, through the end of Caccamo's employment. Smith's suspension and (second) discharge occurred about a week after Caccamo resigned, and Williamson took over as site supervisor.

The General Counsel contends that Respondent's stated reason(s) for suspending and discharging Smith in April 2018 are pretext for its unlawful motivations. I agree. As stated, I find that Smith requested and received permission from Williamson to call PINC to ask about his truck (truck 263). He, however, did not have permission to inquire about truck 261. That being said, I find Respondent seized upon and exaggerated Smith's inquiry about truck 261 as a pretextual reason for suspending and discharging him to mask its true unlawful motivations. This finding is based on several factors.

[18] Respondent contends that the General Counsel spent much of its case re-litigating the union animus from the prior case, and relied upon "[r]umor or innuendo concerning behavior already remedied through settlement, in which Shamrock voluntarily confessed and entered into, does not meet the requirement of demonstrating animus." (R. Br. 14). Respondent entered into an informal settlement agreement *with a non-admissions clause*; therefore, it did not voluntarily confess to the prior allegations. (Jt. Exh. 9).

First, as explained above, Respondent has history of exaggerating (and fabricating) Smith's missteps and doling out excessive penalties in order get rid of Smith.[19] See *Materials Processing, Inc.,* 324 NLRB 719 (1997)(employer's exaggeration of an offense and issuance of a harsh penalty is evidence of pretext); *Radisson Muehlebach Hotel*, 273 NLRB 1464, 1475-1476 (1985); *Harrison Steel Castings Co*., 262 NLRB 450, 479 (1982) enfd. in relevant part 728 F.2d 831 (7th Cir. 1984); and *Electri-Flex Co.*, 238 NLRB 713, 725 (1978). Respondent makes reference to an email from PINC establishing that Smith's inquiry was improper, but this document was not introduced into evidence. The only evidence of Smith's conversations with PINC is his testimony, which I have credited. He inquired about the status of the PINC unit in truck 261. When the PINC representative informed him that they were waiting to hear back from Kraft about whether they were going to move forward with purchasing a replacement, Smith asked whether PINC had sent out an email to DHL or Respondent asking for updated contact information for Kraft, so PINC could contact Kraft directly. Respondent argues Smith's inquiry could have either resulted in it, or its clients, incurring any expenses, thus jeopardizing the continuation of its relationship with those clients. (R. Br. 13). Respondent, however, failed to support this argument with evidence. Smith did not misrepresent himself, his position, or his authority. He did not request or suggest that PINC (re)send the purchase order. He did not commit or suggest that Kraft, DHL, or Respondent would pay for the replacement unit, and no one incurred any costs or expenses as a result of his inquiry. Finally, there is no evidence DHL or Kraft reacted negatively, or threatened to terminate the contract with Respondent, as a result of Smith's inquiry. Respondent's claims, therefore, are unfounded.

Second, Respondent made the decision to suspend and discharge Smith based on a perfunctory investigation. See *Andronaco Industries*, 364 NLRB No. 142, slip op. at 14 (2016)(citing *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed. Appx. 656, 658 (D.C. Cir. 2015) enfg. 357 NLRB 1632 (2011))(failure to conduct a thorough pre-discharge investigation can be evidence of pretext); *Socied Espaiiola de Auxillio*, 342 NLRB 458 (2004), and *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). After Williamson received the PINC email, he contacted Michael Holmes to report what had occurred and recommended that Smith be discharged. Holmes knew that Respondent could not discharge Smith before notifying and meeting with the Union, so Holmes contacted the Union to schedule a meeting. Holmes advised Williamson to tell Smith that he was being suspended pending investigation leading to termination. Three days later, Holmes and Respondent's attorney Jim Allen met with the Union to get Smith's statement. There is no evidence Respondent did anything else, before or after that meeting, to "investigate" the matter. Nor is there any evidence that Respondent contacted PINC, or the two PINC representatives Smith spoke to, about their conversations.

Third, Respondent has offered shifting or inconsistent explanations for its decision to suspend and discharge Smith. See *Lucky Cab Co*., 360 NLRB at 275; *City Stationery, Inc.*, 340 NLRB 523, 524 (2003); and *GATX Logistics, Inc*., 323 NLRB 328, 335 (1997). Holmes initially testified Smith was suspended and later discharged because he was "not authorized to request information about a purchase order or attempt to create some kind of issue between these companies or push Shamrock to buy something when they don't even have the ability to do that." (Tr. 342). Holmes later was asked if Smith was discharged because of his union activities, and he responded, "Absolutely not. Shane Smith was fired because he contacted PINC about something he had no authorization to contact PINC about." (Tr. 349). On cross-examination, Holmes testified Smith was discharged because of his unauthorized contact with

[19] I am mindful the Board does not second-guess an employer's business decisions, but it is charged with determining whether business decisions are motivated by union animus and whether stated rationales are pretext. See *Real Foods Co.*, 350 NLRB 307, 312 (2007).

PINC "and his threats." (Tr. 359). The alleged "threats" were Smith's statement to Williamson when he was suspended that, "I'll be back with or without pay and you're done." (Tr. 359). The "you're done" portion being the alleged threat.

Respondent argues in its post-hearing brief it was concerned about these statements "because Smith has a documented history of workplace harassment and violent behavior." (R. Br. 5, 13, and 16). This "documented history" relates solely to the exchange between Smith and Clarkson after he was first discharged. (Tr. 255-257). As previously stated, Respondent took no action against Smith at the time, and Clarkson acknowledged that after Smith was reinstated, and he was told by the Union to leave her alone, there were no further issues. Of significance is that in both Clarkson exchange and Williamson exchange, Smith is accused of reacting improperly immediately *after* being unlawfully discriminated and retaliated against because of his statutorily protected activities.

In its post-hearing brief, Respondent raises two new post hoc arguments to justify its decision to discharge. See *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 509 (2007)(post hoc attempts to rationalize adverse actions are suggestive of a pretext); *Aljoma Lumber, Inc*., 345 NLRB 261, 287 (2005); *Yukon Manufacturing Co*., 310 NLRB 324, 340 (1993); and *Bay Metal Cabinets, Inc*., 302 NLRB 152, 173 (1991). First, Respondent argues that Smith's inquiry violated Section 6.13 of the employee handbook. (R. Br. 13). Section 6.13 states: "Only authorized persons may purchase supplies in the name of Shamrock Cartage Inc. No employee whose regular duties do not include purchasing shall incur any expense on behalf of Shamrock Cartage Inc. or bind Shamrock Cartage Inc. by any promise or representation without express written approval." (Jt. Exh. 10, pg. 041). However, as stated, Smith did not purchase or incur any expenses on behalf of Respondent, nor did he attempt to do so, when he contacted PINC regarding truck 261. Second, Respondent accuses Smith of insubordination following his suspension. Specifically, Respondent contends Smith was insubordinate when he called PINC back and spoke to the two representatives after being suspended for calling PINC in the first place. However, there is no evidence this rationale was ever considered or relied upon when Respondent discharged Smith. As such, I find these shifting and post hoc justifications further bolster a finding of pretext.

Finally, Respondent's decision to suspend and discharge Smith was disproportionate compared to the discipline (not) issued to others. See *Airgas USA, LLC*, supra (disparate treatment or disproportionate discipline can be evidence of pretext). As stated, the General Counsel introduced evidence of how Respondent disciplined other employees for misconduct, including Travis Hamilton and Shane Soward. Respondent was far more tolerant with Hamilton and Soward than with Smith. Hamilton was not suspended or discharged, despite calling off 13 times in a four-month period and being a no-call/no-show during a busy holiday shift, and even though his supervisor was effectively begging for Hamilton's termination. Soward was not immediately suspended or discharged for directing profanity at a customer on his 3rd day of employment. Smith made mistakes, but, according to Caccamo, he did not call off work, respected his supervisor, and did a good job. Yet, Respondent immediately suspended and later discharged him following a perfunctory investigation because of the potential consequences associated with his unauthorized inquiry and suggestion that PINC send an email to get updated contact information in the event they wanted to contact Kraft directly. I find this evidence, along with the exaggeration of Smith's missteps, the perfunctory investigation, and shifting and post hoc defenses, conclusively establish pretext and that Respondent simply was waiting for a seemingly legitimate reason to finally get rid of Smith because of his statutorily protected activities.

In short, I find the General Counsel has proven that Smith's union and Board activity was a motivating factor for his April 2018 suspension and discharge.[20] As stated, a finding of pretext defeats any attempt by the employer to show that it would have taken the adverse employment actions absent the employee's statutorily protected activities. However, even if I did not find pretext, I would conclude that Respondent has failed to meet its burden under *Wright Line* because it has presented no comparators or other evidence establishing that it would have taken the same actions against Smith in the absence of his statutorily protected activities.

Based on the foregoing, I find that Respondent discriminatorily suspended Smith on April 9 and later discharged him on April 13 because he engaged in protected union activities, and to discourage others from engaging in those activities, and because he filed charges or gave testimony under the Act, in violation of Sections 8(a)(4), (3) and (1) of the Act.

3. Refusal to Provide Union Notice and Bargain Prior to Suspending Smith

The amended complaint alleges Respondent violated Section 8(a)(5) of the Act when it failed to provide the Union with prior notice and an opportunity to bargain before it made the discretionary decision to suspend Smith on April 9. In *Total Security Management Illinois 1, LLC*, 364 NLRB No. 106 (2016), the Board held an employer has a statutory obligation to bargain before imposing discretionary discipline on unit employees when a union has been certified or lawfully recognized but has not yet entered into a collective-bargaining agreement with the employer.[21] The Board held an employer may not impose discretionary discipline of a serious nature, which it defined as actions such as suspension, demotion, and discharge that plainly have an inevitable and immediate impact on employee's tenure, status, or earnings. Id. slip op. at 4. The Board later explained the actions at issue "would typically result in loss of pay or employment status, necessitating backpay and reinstatement to make affected employees whole." Id. slip op. at 15. One exception is that an employer may impose discipline without providing the union with notice and an opportunity to bargain "in any situation that presents exigent circumstances: that is, where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." Id. at slip op. 11. This encompasses situations where "the employer reasonably and in good faith believes that an employee has engaged in unlawful conduct that poses a significant risk of exposing the employer to legal liability for the employee's conduct, or threatens safety, health, or security in or outside the workplace." Id.

Respondent first contends there was no obligation to bargain because Smith suffered no loss of pay or status as a result of the suspension since he was paid for his suspension. (R. Br. 8 and 17). But Smith's unrefuted testimony was he was only paid for April 9. (Tr. 222-223). Therefore, Respondent's decision to suspend Smith constitutes discipline of a serious nature

[20] Respondent argues there is no evidence of "contemporaneous animus." I reject this argument. As stated, Respondent's owners told Caccamo to continue monitoring Smith following his reinstatement to find anything that he did wrong, and they continued to check in with Caccamo about Smith through the end of Caccamo's employment on March 30, 2018. Furthermore, even if the direct evidence of animus demonstrated by Respondent in August, October and November 2017 was considered too remote, evidence of animus exists from the pretextual reasons for Smith's April 2018 suspension and discharge. See *Foothill Sierra Pest Control, Inc.*, 350 NLRB 26, 29 (2007) and cases cited therein.

[21] There is no dispute Smith's suspension was a discretionary decision. Respondent's handbook addresses discipline but does not set forth a progressive disciplinary system, there is no evidence or contention of an established practice of suspending employees for the alleged offense(s) at issue, and Holmes acknowledged that it was discretionary.

under *Total Security Management* because it resulted in the loss of earnings for the remaining days of his suspension.

Respondent next contends its failure to provide the Union with notice prior to suspending Smith was justified by exigent circumstances. Setting aside Respondent's true motivation for suspending Smith, which I have found to be discriminatory and retaliatory, I find there were no exigent circumstances requiring Smith's immediate suspension. Respondent contends that Smith's unauthorized contact with PINC posed "a serious imminent danger" to its business. (R. Br. 17). Respondent failed to present evidence or argue how this was so. Williamson testified that before he could respond to the email from PINC, DHL's manager Joe Hunt responded to PINC and communicated (again) that Kraft would be responsible for paying for the replacement unit in truck 261, not DHL or Respondent. As such, any potentially damaging confusion allegedly caused by Smith's inquiry was quickly corrected, and there was no serious imminent danger to its business.[22] Furthermore, Respondent's claim that it had to immediately suspend Smith because of the "serious imminent danger" posed to its business and customer relations rings hollow when Respondent did not immediately suspend Shane Soward after he said "Fuck you, you little bitch" to the manager at the Pepsi/Ryder center. Instead, Williamson reassigned Soward to finish his shift at the Kraft/DHL center and then continued to counsel him about his conduct two days later.

Based on the foregoing, I find that Respondent violated Section 8(a)(5) and (1) of the Act when it failed to bargain with the Union before it made the discretionary decision to suspend Smith on April 9.

CONCLUSIONS OF LAW

1. Respondent, Shamrock Cartage, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by suspending and later discharging employee Shane Smith, because of his protected union activities and/or to discourage others from engaging in those activities.

4. Respondent has engaged in unfair labor practices in violation of Section 8(a)(4) and (1) of the Act by suspending and later discharging employee Shane Smith, because he filed charges or gave testimony under the Act.

5. The Union is the recognized Section 9(a) collective-bargaining representative of the following unit of Respondent's employees:

[22] Respondent unilaterally suspended Smith pending an investigation. This appears to be a unilateral implementation of the "investigatory leave" procedure contained in Respondent's proposed memorandum of understanding, which Respondent withdrew after the Union rejected it. Such a unilateral implementation prior to the parties reaching an agreement or a good-faith impasse would constitute a violation of Section 8(a)(5) of the Act, separate from a violation under *Total Security Management*. However, as there is no allegation or argument, I make no findings regarding such conduct.

All full-time and regular part-time yard spotter/hostler employees employed by [Respondent] at the DHL facility located at 2842 Spiegel Drive, Groveport, Ohio and at the Ryder Logistics facility located at 3880 Groveport Road, Obetz, Ohio, excluding all office clerical employees, all professional employees, guards and supervisors as defined in the Act.

6. Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act when it issued a discretionary suspension to Shane Smith without providing the Union with prior notice or an opportunity to bargain over that suspension.

7. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. Respondent has not violated the Act except as set forth above.

9. I recommend dismissing the allegation that Respondent violated Section 8(a)(1) of the Act by threatening Smith with the more onerous working condition of working with "bad workers" because the Union rejected Respondent's proposal on discipline during contract negotiations.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent, having discriminatorily discharged Shane Smith because he engaged in protected union activities and filed charges or gave testimony under the Act, shall be ordered to offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. As the discharge involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010)

Respondent, having discriminatorily suspended Shane Smith because he engaged in protected union activities and filed charges or gave testimony under the Act, as well as suspended him without first bargaining with the Union, shall be ordered to offer him reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and the make whole remedy for any loss of earnings and other benefits caused by the suspension shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance *with Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), the Respondent shall compensate Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey,*

Inc., 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 9 a report allocating the backpay award to the appropriate calendar year for Smith. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Smith for any search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. The Respondent shall also be ordered to expunge from its files any and all references to the discharge of Shane Smith, and notify him in writing that this has been done and that evidence of the unlawful action will not be used against him in any way.

The General Counsel requests that I order a responsible management official read the notice to the assembled employees, or to have a Board agent read the notice in the presence of a responsible management official. I note that the Board has held that in determining whether additional remedies are necessary to fully dissipate the coercive effect of unfair labor practices, it has broad discretion to fashion a remedy to fit the circumstances of each case. *Casino San Pablo*, 361 NLRB 1350, 1355-1356 (2014); *Excel Case Ready*, 334 NLRB 4, 4-5 (2001). This remedy is atypical and generally ordered in situations when there is a showing that the Board's traditional notice remedies are insufficient, such as when a respondent is a recidivist violator of the Act, when unfair labor practices are multiple and pervasive, or when circumstances exist that suggest employees will not understand or will not be appropriately informed by a notice posting. Here, the violations are both serious and repeated, and I find the circumstances warrant a notice reading remedy. Respondent previously entered into an informal settlement agreement with the Board just four months before the violations at issue to resolve the allegations arising out of the 2017 organizing effort, which specifically addressed some of the same type of violations at issue in this case, namely continuing to discriminate against an the same employee for engaging in statutorily protected activity. Additionally, I find Respondent continued to harbor animosity toward Smith, in part, because of the prior informal settlement. As a result, I find the traditional remedy of posting the notice to employees alone is inadequate.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:[23]

ORDER[24]

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees because of their union activities and/or to discourage others from engaging in those activities;

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Suspending, discharging, or otherwise discriminating against employees because they filed charges or have given testimony under the Act;

(c) Issuing discretionary suspensions or discipline to unit employees that result in the loss of pay or employment status, without bargaining with the Union;

(d) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Shane Smith full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make whole Shane Smith for any loss of earnings and other benefits suffered as a result of his unlawful suspension and discharge, including any search-for-work and interim employment expenses, in the manner set forth in the remedy section of this Decision.

(c) Compensate Shane Smith for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Shane Smith, and within 3 days thereafter, notify said employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including electronic copies of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked “Appendix.” Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 9, 2018.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the "Notice to Employees" will be read to unit employees by owners Dan O'Brien and Matt Harper, or by a Board agent in the presence of Dan O'Brien and Matt Harper. If O'Brien or Harper is no longer an owner, then Respondent shall designate another owner or officer to conduct or be present for the reading.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 6, 2018.

ANDREW S. GOLLIN
ADMINISTRATIVE LAW JUDGE

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT
FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees because of employees' union activities and/or to discourage others from engaging in those activities.

WE WILL NOT discharge or otherwise discriminate against employees because they filed charges or have given testimony under the Act.

WE WILL NOT issue discretionary suspensions or discipline to unit employees that results in the loss of pay or employment status, without bargaining with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL bargain with the Union regarding discretionary suspensions or discipline to unit employees that result in the loss of pay or employment status.

WE WILL offer Shane Smith full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Shane Smith whole for any loss of earnings and other benefits resulting from his unlawful April 9, 2018 suspension and April 13, 2018 discharge, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Shane Smith for the adverse tax consequences, if any, of receiving a lump sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL remove from our files any reference to our unlawful April 9, 2018 suspension and April 13, 2018 discharge of Shane Smith, and we will notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the "Notice to Employees" will be read to unit employees by owners Dan O'Brien and Matt Harper, or by a Board agent in the presence of Dan O'Brien and Matt Harper. If O'Brien or Harper is no longer an owner, then we shall designate another owner or officer to conduct or be present for the reading.

SHAMROCK CARTAGE, INC.
(Employer)

DATED: _____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

John Weld Peck Federal Building, 550 Main Street, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/09-CA-219396 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3733.